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African Politics, African Peace charts an agenda for peace in Africa, focusing on how the African Union can implement its norms and use its instruments to prevent and resolve armed conflicts. It is an independent report of the World Peace Foundation, supported by the African Union.

The Report is the most extensive review of the African Union's peace missions ever conducted. It is based on detailed case studies and cross-cutting research, and draws on consultations with leading experts, peacekeepers, and mediators.

This Paper is a summary of research undertaken in support of the Project.

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Unconstitutional Changes of Government and Unconstitutional Practices in Africa

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Introduction:

This paper analyzes the African Union (AU)'s normative framework on Unconstitutional Changes of Government (UCG), and is intended to serve three purposes: to trace the origins of the norm, identifying the major gaps; to review the AU's implementation and enforcement of the norm; and to discuss potential means for reconciling the identified gaps between the norm and practice. It recommends:

1. The consolidation of the instruments containing the various norms against UCG into a single framework consisting of:
 - a. first, a clear statement that the object of the norm is to protect the will of the people and does not preclude their right to peacefully protest against oppressive systems;
 - b. second, a clear, comprehensive list of the circumstances that constitute UCG, including those listed in the Lomé Declaration and the 2007 Addis Ababa Charter, and expanded to include issues such as retention of government power without holding free and fair elections for a prolonged period of time, election rigging and election malpractice duly ascertained by a credible, independent body, and
 - c. third, a comprehensive list of measures to be applied in case of UCG.
2. Elaboration of provisions to address the gaps in the UCG norm, including by:

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- a. providing a mechanism that outlines specific guidelines to determine when popular uprisings are or are not UCG;
 - b. articulating the standard by which restoration of constitutional order and lifting of sanctions is to be judged, and
 - c. avoiding divergent application of the norm on UCG; this could be accomplished by the AU and the Regional Economic Communities (RECs) agreeing on a process for assessing whether the required conditions for UCG were met.
3. Elimination of the distinction between UCG, serious human rights and democratic deficits. To do this, the sanctions applicable in UCG cases should also be applicable to cases of systematic violations of human rights and democratic principles. Additionally, the AU Peace and Security Council should develop mechanisms for operationalizing Article 19 of the founding Protocol (on establishing close working relationship with the African Commission and Court on Human and People's Rights).
 4. Establishment of an expert group on the implementation of the AU norm on UCG as its subsidiary body which would offer technical support in assessing and monitoring different elements of UCG on the continent.

Key Findings:

Between 1952 and 2014 there were 91 successful coups in Africa, and prior to 1990's, coups had become the main mode of political contestation and leadership change in the majority of African states. They eroded and undermined constitutional rule, entrenched bad governance and created conditions inimical to citizen's freedom (including by encouraging future coups). This changed with the revival of multi-party politics in Africa

in the 1990s, which led to the emergence of a belief in elections as the only legitimate basis for assuming and retaining government power. Building on this belief, the O/AU has become not only the defender of democracy and constitutional rule on the continent, but has also taken on the role of promoting democracy and helped enshrine the norm against the UCG in various legal instruments. Through norms like the UCG, the O/AU has even exceeded the United Nations in expansively articulating the conditions that would be considered threats to peace and security.

The creation of the norm against UCG

While the norm against UCG has strong bases in the evolving interpretation of the concept of threats to international peace and security within international law and the post-Cold War normative interest of international law and international organizations in the defense of constitutional order and in the promotion of democratic governance, in Africa its origin is associated with shift in the 1990s from one party and/or military rule to a system of government based on multiparty democratic elections . With military coups targeting new governments coming to power through generally free elections, Africa was faced with the need for preventing the menace of coups from derailing the democratization process.

The norm against UCG began with measures proposed by the 1997 OAU Council of Ministers for the restoration of constitutional order in response to the coup d'état in Sierra Leone. These measures urged African countries and the international community to refrain from recognizing or supporting the perpetrators of the coup d'état which had overthrown the democratically elected government. Subsequently, at its Algiers Summit in 1999, the OAU reviewed the various methods by which governments were changed in Africa and unanimously rejected unconstitutional changes in government as a contradiction to democracy. This Summit also called on leaders who

had come to power between these meetings to restore constitutional rule before the OAU's annual summit in Lomé in 2000.

At that meeting, the Lomé Declaration was adopted. It banned UCG in order to preserve ongoing democratization on the continent and to officially codify that constitutional means were the only acceptable methods of changing governments. The Lomé Declaration defines what instances are considered UCG and discusses the measures that should be taken when UCG occurs. The instances that are considered UCG in the document include: military coup d'état against a democratically elected government; an intervention by mercenaries against a democratically elected government; a replacement of a democratic government by armed dissident groups and rebel movements; and the refusal of an incumbent government to relinquish power to the winning party after a free and fair election. The measures to be taken in the event of UCG include: a condemnation of the act and a warning to the perpetrators; a granting of six months to restore constitutional order and the suspension from participation of activities in the continental body; and limited and targeted sanctions if after six months constitutional order has not been restored. A significant step toward preserving democracy on the continent, the Lomé Declaration was limited by its inability to be binding to member states until the Constitutive Act of the AU was adopted. It also did not address certain issues like manipulating the constitution to remain in power; election rigging and more. These were major limitations.

Article 4(p) of the Constitutive Act of the AU sets out the prohibition of the UCG as one of the foundational principles of the AU; in fact, it is the only commitment in the Constitutive Act backed by a sanction, which prohibits governments taking power through UCG from participating in the activities of the AU. This prohibition was also included in the Protocol Establishing the AU Peace and Security Council (PSC) under Article 7(g).

However the 2007 Addis Ababa Charter provided more substance to the norm, expanding the definition of UCG to include the issue of retaining power unconstitutionally. It also expanded the measures to be taken in the event of UCG to prevent perpetrators from participating in elections to attempt to gain "democratic" leadership in that way. Finally, it strengthened the sanctions regime. The norm has further been enunciated in decisions taken and declarations adopted by both the AU Assembly and the PSC.

Forms of UCG

As articulated in the AU instruments, UCG takes different forms. These include:

Military coups:

Three types of military coups have been observed in recent years: (a) *military coups proper*, where members of the army depose the incumbent political leader and put in place a military led government, for example in Mauritania (2005 and 2008), Guinea Bissau (2009 and 2012), Niger (2010), and Mali (2012); (b) *cases of forced change of government involving mass protest*, where mass protests facilitated military backed change of government. Examples include Madagascar and Egypt, and (c) the *army's involvement in violation of constitutional processes* which was the case in Togo.

Intervention by mercenaries:

Since the norm against UCG was instituted, there has been no successful overthrow of a government by mercenary forces, though they did attempt to do so in Equatorial Guinea.

Removal of democratic governments by armed rebels:

Good examples include the removal of the CAR government by an armed rebel group headed by the former chief of staff of the CAR army in 2003 and the

subsequent removal of this government by another rebellion in 2013.

Refusal of an incumbent to relinquish power:

While Kenya and Zimbabwe are cited as difficult examples but relevant to this form of UCG, the only case that the AU actually considered as constituting UCG on the ground of refusal of an incumbent to relinquish power was Cote d'Ivoire.

The amendment of a legal instrument or the constitution to prevent constitutional change in government as was unsuccessfully sought in Nigeria and Burkina Faso.

Gaps in enforcement

There are major gaps in the existing AU norm for UCG. Arguably the most critical is the inadequate or lack of definition and poor formulation of the five instances that constitute UCG. The second major shortcoming relates to when constitutional order is said to have been restored. The lack of consistency in practice by the AU on this issue causes significant confusion when it comes to implementing the UCG norm. A case in point is the Madagascar case in which the reinstatement of the deposed president was not considered as a restoration of constitutional order by SADC or the AU, but was ultimately only considered restored upon the establishment of a new government determined via free and fair elections. A final critique is the lack of guidance on the fundamental causes of UCG. The AU has not developed a comparable framework for sanctioning major democratic and human rights deficits that underline the emergence of instances of UCG.

With regard to gaps in the implementation and enforcement framework, it is problematic that the AU and RECs have historically diverged in their policy practice when it comes to determining whether a country has restored constitutional order. In particular, the Mali case is notable in which ECOWAS lifted Mali's

suspension upon the signing of an agreement between ECOWAS negotiators and the military *junta*, but the AU maintained its sanctions. This also occurred in Guinea Bissau with ECOWAS being satisfied with the country's transitional government and being at odds with the AU which required an election and a democratically elected government to be in place before lifting their suspension. Another major gap is the inconsistency and lack of transparency in the application of the UCG norm.

Finally, the auto-legitimization of coup perpetrators through subsequent elections has been a challenge for the AU in enforcing the UCG norm. In theory, this issue was to be assisted by the adoption of the Addis Ababa Charter in 2007 which banned the legitimization of coup perpetrators, but the rule only became binding in 2010. A major test for the application of this rule emerged with respect to Egypt but the AU failed to enforce it when it reinstated Egypt despite the fact that the leader of the military that deposed the democratically elected government auto-legitimized himself via elections.

Existing and Emerging Issues

The AU continues to debate whether to categorize specific events, such as popular uprisings (as those sweeping across North Africa during the Arab Spring), and the manipulation of constitutional term limits (as in the Republic of Congo) as UCG. The AU has also begun to strengthen the norm against UCG by criminalizing the perpetration of acts leading to UCG (although the Protocol is still to come into effect).

UCG's are usually the result of serious deficits in democratic governance, observance of people's and human rights, the rule of law and constitutionalism. Critically, the AU has failed to define the actions or measures that it needs to take in cases of serious breaches of these norms. As a result, the AU's actions on UCG continue to remain reactive rather than becoming preventive.

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